Chicago-Kent Law Review

Volume 69
Issue 2 *Symposium: Is the Law Male*

Article 6

December 1993

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INTRODUCTION

In this Essay we first address the meaning of the assertion that the law is male and argue that the claim encompasses three observations. In the second half, we apply these ideas about the maleness of the law to the problem of determining standards for the resolution of child custody disputes. We conclude that the law is indeed male, that there are some important virtues to the "maleness" of law and that those male strengths should be deployed to help women, as well as men.

The first and most obvious way in which the law is male is that historically, and today, it systemically favors men and oppresses women. "[O]ur Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."[1] The feminist movement of the 1970s, under the legal leadership of our newest Supreme Court Justice, Ruth Bader Ginsburg, was substantially successful in challenging explicit gender bias.[2] Nonetheless, as with race, the law has been less willing to grapple with rules that are neutral in form but discriminatory in effect.[3] In short, the law is male because the substance of its rules systemically favors men and disfavors women.

Second, the law is male in that its principles—justice, abstract rules, predictability, autonomy—apply to the public (male) worlds of

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1. Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

2. *See* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 969-83 (1984).

3. *See, e.g.*, Feeney v. Personnel Administrator, 442 U.S. 256 (1979) (involving gender); Washington v. Davis, 426 U.S. 229 (1976) (involving race).

market and politics, while premodern customary expectations of care and concern apply in the private (female) worlds of home and family.[4]

The third facet of the claim that the law is male rests on Carol Gilligan's observations about gender-based tendencies in patterns of moral reasoning.[5] In a classic experiment a boy and a girl—Jake and Amy—are asked to reason about whether a man without money should steal the drugs his wife needs to live.[6] For Jake the answer is clear, hierarchical and rule bound. Life is more important than property.[7] For Amy the problem is more complex. If the man steals the drugs, maybe he will go to jail and that would not be good for anyone. Maybe the man could appeal to the druggist's humanity and persuade him to give his wife the drugs. Amy seeks to place the problem in a complex, messy human context. She wants to change the hypothetical.[8] She flunks moral reasoning.[9]

4. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Kathryn L. Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 WIS. L. REV. 55.

5. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

6. *Id.* at 26-39.

7. Gilligan explains that:

> Constructing the dilemma, as Kohlberg did, as a conflict between the values of property and life, [Jake] discerns the logical priority of life and uses that logic to justify his choice. . . . Fascinated by the power of logic, this eleven-year-old boy locates truth in math, which, he says, is "the only thing that is totally logical." Since his solution is rationally derived, he assumes that anyone following reason would arrive at the same conclusion and thus that a judge would also consider stealing to be the right thing for [the man] to do.

Id. at 26-27.

8. Gilligan explains that:

> Seeing in the dilemma not a math problem with humans but a narrative of relationships that extends over time, Amy envisions the wife's continuing need for her husband and the husband's continuing concern for his wife and seeks to respond to the druggist's need in a way that would sustain rather than sever connection. Just as she ties the wife's survival to the preservation of relationships, so she considers the value of the wife's life in a context of relationships, saying that it would be wrong to let her die because, "if she died, it hurts a lot of people and it hurts her." Since Amy's moral judgment is grounded in the belief that, "if somebody has something that would keep somebody alive, then it's not right not to give it to them," she considers the problem in the dilemma to arise not from the druggist's assertion of rights but from his failure of response.

Id. at 28.

9. Gilligan explains that:

> When considered in the light of Kohlberg's definition of the stages and sequence of moral development, her moral judgments appear to be a full stage lower in maturity than those of the boy. . . . As her reliance on relationships seems to reveal a continuing dependence and vulnerability, so her belief in communications as the mode through which to resolve moral dilemmas appears naive and cognitively immature.

Id. at 29.

Sylvia Law distributes the Jake and Amy story to first-year torts students, several weeks into the semester. "I tell students that my job is mostly to make them think like Jake, to drum those mushy Amy instincts out of them, and to help them to think like a lawyer. People, particularly

Thus, the claim that the law is male encompasses at least three distinct observations. This Essay addresses those claims in the context of the specific problem of child custody disputes. The history and present state of child custody law support the claim that the law is male in each of the three ways identified above.

I. MALE LAW IS SYSTEMICALLY BIASED AGAINST WOMEN

Custody law—historically and today—systemically favors men. The eighteenth and nineteenth century law explicitly favored men by giving them the absolute right to custody of children as a form of chattel.[10] Historically, the law of child custody in the United States has employed presumptions. Colonial America adopted the English common-law concept that a father was presumptively entitled to custody of his children. After Independence, and throughout the eighteenth century, and most of the nineteenth century, fathers enjoyed a nearly absolute entitlement to custody of their children, unless the father was proved clearly unfit, guilty of serious abuse of the child, or unable to care for the child.[11] The custody rule protecting the rights of the father was not concerned with either parenting ability or children's interests or desires.

In mid-nineteenth-century United States, a new custody rule of decision that presumed that the mother should have custody of children of "tender years" (i.e., under age seven) replaced the common-law rule that granted custody to the father. The rationale of the rule was that only the mother possessed qualities of love, patience, and tenderness needed to care for and raise young children.[12] At the same time, courts continued to give custody of older children, especially older boys, to the father. A father seeking custody of a young child had to prove that the mother was unfit. Unfitness included proof of adultery or intemperance.

women, find some comfort in the identification of a phenomena that has been disturbing to them."

10. Historian Michael Grossberg describes the tradition of paternal possession and the successful challenge to it in the late nineteenth century by feminist agitation, stressing the role that mothers play in children's nurture. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH-CENTURY AMERICA 244-47 (1985). *See also* JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE 221 (1986); Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 235-37 (1982).

11. JOHN P. MCCAHEY ET AL., CHILD CUSTODY AND VISITATION LAW AND PRACTICE, 1-14 to 1-15.

12. *Id.* at 1-19.

The maternal preference for custody of children of tender years, while helping some women, implicitly favored men. It reinforced notions that mothers are responsible for children and fathers are not.[13] Further, when a father sought custody, the so-called maternal preference was defeated on the flimsiest and most sex-biased showing of maternal "unfitness."[14]

In the 1960s and 1970s, family law shifted away from fault-based regimes to "no fault," which made divorce easier to obtain and, in theory, less stigmatizing. The substantive rules for determining custody also changed, away from the maternal presumption to a gender-neutral standard, articulated as "the best interest of the child." Advocates of the "best interest" test claimed that it shifted focus away from possessory rights of parents to the needs of the specific children.

In 1993, the overwhelming majority of states apply some version of the "best interests of the child" standard.[15] While the title of the test is identical among the states, the content of the "best interest" test differs in each.

In some states, statutes specify the factors that trial courts should consider in determining the best interests of the child.[16] For example, the Michigan Child Custody Act lists ten specific factors, and directs judges that the:

> "Best interests of the child" means the sum total of the following factors to be considered, evaluated and determined by the court:
>
> (a) The love, affection, and other emotional ties existing between the parties involved and the child.

13. *See, e.g.*, Meinhardt v. Meinhardt, 111 N.W.2d 782, 784 (Minn. 1961) ("That there is no substitute for the love, companionship, and guidance of a good mother hardly needs any argument."). Professor Mary Jo Frug observed that the rule of maternal preference "not only allocate[s] disproportionately more child rearing responsibilities to women in formal legal disputes; it also signal[s] to men and women making 'private' decisions regarding parenting responsibilities that the legal system expect[s] women to do more parenting and to do it better than men." *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1060 (1992).

14. Judge Richard Neely of the West Virginia Supreme Court observes:

> In application, the rule of maternal preference allowed judges substantial leeway to take a mother's fault into consideration in the award of custody. It was frequently the case, therefore, that sexual "promiscuity" (a term that tends to mean different things when applied to women than to men, with women getting the short end of the double standard) on the part of the woman would cause a court to declare her "unfit."

Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168, 170 (1984).

15. IRA MARK ELLMAN ET AL., FAMILY LAW 498-99 (2d ed. 1991).

16. *E.g.*, MICH. COMP. LAWS ANN. § 722.23 (West 1990). Statutes are summarized in ELLMAN ET AL., *supra* note 15, at 498-99.

(b) The capacity and disposition of the parties involved to give the child love, affection, guidance and continuation of the educating and raising of the child in its religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school and community record of the child.

(i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent.

(k) Any other factor considered by the court to be relevant to a particular child custody dispute.[17]

In contrast, New York State's statutory "best interest" test is defined to require that:

> [T]he court must give such direction, between the parties, for the custody and support of any child of the parties, as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child. In all cases there shall be no prima facie right to the custody of the child in either parent.[18]

A recent New York appellate division decision explains that the following factors should be considered in determining the best interests of the child:

> (1) the continuity and stability of the existing custodial arrangement, including the relative fitness of the parents and the length of time the present custodial arrangement has continued; (2) quality of the child's home environment and that of the parent seeking custody; (3) the ability of each parent to provide for the child's emotional and intellectual development; (4) the financial status and ability of each parent to provide for the child; (5) the individual

17. Mich. Comp. Laws Ann. § 722.23. The Michigan statute has been interpreted to require that custody judges state a conclusion on each of the ten factors. A summary statement that all factors have been considered is not sufficient. Truitt v. Truitt, 431 N.W.2d 454, 458 (Mich. Ct. App. 1988).

18. N.Y. Dom. Rel. § 240 (Consol. 1993).

needs and expressed desires of the child; and (6) the need of the child to live with siblings.[19]

Cases tried under a "best interest" standard usually require expert testimony because the underlying facts are not easily observed. Evidence of the psychological status of the parties and children, parental capacity and willingness to promote a relationship with a former spouse, and other factors is necessary. The "best interest" test involves many facts and factors that are interdependent and unique to the circumstances of the particular family. It requires a prediction about the future rather than an evaluation of the family relations prior to the breakup. The "best interest" standard favors the party with the greatest resources to mount an expert-based claim.[20] In most cases that is the man.

Further, the "best interest" standard is extremely vague and unpredictable. Vagueness and uncertainty in custody standards work to the advantage of the party who is less committed to maintaining custody, typically the man.[21] Mothers give up solid legal claims to marital property or child support to resist the man's "Brer Rabbit" claim to custody.[22] A law that systemically forces women to give up honest economic claims to care for their children is biased against women.[23]

The vagueness and uncertainty of the "best interest" standard vests tremendous discretion in trial court judges. Trial court determinations under the "best interest" standard typically review evidence and conclude, "on the basis of all the facts and evidence before me, I

19. Fox v. Fox, 582 N.Y.S.2d 863, 864 (App. Div. 1992) (citations omitted). The same appellate court in the same state had earlier formulated the factors for determining parental fitness as "his or her financial status, capacity to provide for the children's emotional and intellectual development, and inclination to encourage regular contact with the noncustodial parent that is the joint right of the children and the other parent." Mahoney v. Mahoney, 521 N.Y.S.2d 587, 588 (App. Div. 1987). Another appellate court in New York identified as factors only the "quality of the home environment, the need for stability in a child's life and the relative fitness of the respective parents." Lynn W. v. Guy C., 519 N.Y.S.2d 400, 401 (App. Div. 1987) (citations omitted) (involving custody of out-of-wedlock child).

20. *See* Pikula v. Pikula, 374 N.W.2d 705, 712-13 (Minn. 1985); Garska v. McCoy, 278 S.E.2d 357, 362 (W. Va. 1981).

21. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 978-79 (1979); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975); Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 653-54 (1992).

22. Mnookin, *supra* note 21 (arguing that psychological theories cannot accurately predict the effects of alternate custody determinations and arguing for less discretionary custody award standards).

23. *See* Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987).

find that the best interest of the child will be served by . . . ." Such a conclusory judgment is effectively unreviewable on appeal. Unfettered discretion permits judges (usually older, white males) to incorporate their own personal history, experience and bias in adding content to the "best interest" principles.

In most states, the standard for appellate review of trial court custody determination is "abuse of discretion" or even higher.[24] Because the most important factors in a "best interest" determination involve a trial court's observations of the parties, the appellate court has no objective way to find that the trial court committed error except in the most egregious case.[25] Thus few custody cases are appealed and the absence of appellate decisions reinforces trial court discretion. Even in the rare cases where custody judgements are appealed, they are rarely reversed. A study completed in the early 1980s found that trial-court custody decisions were reversed on appeal only eighteen percent of the time.[26]

We argue that the law of custody systemically favors men despite the fact that most divorcing parents agree that children should stay with their mothers.[27] Often it is convenient for the father to leave the kids with the mother. Usually this coincides with the mother's placing a high value on maintaining custody because she has deep connections to her children.

II. MALE LAW FAILS TO PAY ATTENTION TO VITAL ISSUES OF FAMILY

The law of custody embodies the notion that the public law of politics and markets is important, while the private law of the family is not. No one pays much attention to family law, including the vital issues of child custody. Even though family law cases constitute the largest category of filings at the trial court level, appellate consideration of family disputes is relatively rare.[28] In part, the absence of re-

24. For example, the Kansas Supreme Court held that custody decisions will be upheld unless "no reasonable man would take the view adopted by the trial court." Stayton v. Stayton, 506 P.2d 1172, 1175 (Kan. 1973).

25. Osteraas v. Osteraas, 859 P.2d 948, 950 (Idaho 1993).

26. Jeff Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 FAM. L.Q. 1, 39 (1984).

27. See the data summarized in ELLMAN ET AL., *supra* note 15, at 508-09.

28. In 1991, family law cases were the largest single category of civil filings and trials at the trial court level (33%), as compared with tort (10%), contract (14%), real property (10%). CONFERENCE OF STATE COURT ADMINISTRATORS, THE STATE JUSTICE INSTITUTE, AND THE NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT, 1991, at 15 (1993). However, family law cases constitute a very small portion of the docket of

view is a function of the indeterminacy and fact-specificity of the "best interest" standard.[29] But the question of appropriate standards is well-suited to appellate and legislative determination. In most jurisdictions, neither the courts nor the legislatures have grappled with custody standards in recent years.[30]

When courts or legislatures do address the principles for adjudicating child custody disputes, they often act without close attention to factual complexity, empirical evidence, or respect for generally prevailing principles of lawmaking. For example, in the 1970s, courts rushed to adopt the Goldstein, Freud, and Solnit theory that exclusive custody should be awarded to the "psychological parent," with little serious attention to the lack of evidentiary or ethical support for the psychological parent theory.[31]

A second example of thoughtless action in the custody area occurred in the 1980s when several jurisdictions adopted a strong preference for joint custody.[32] Again, the presumption for joint custody was adopted without careful attention to empirical evidence or diversity of factual situations.[33] Much evidence supports the notion that joint custody is the best arrangement in ideal circumstances,[34] but successful joint custody requires proximity, communication, and the resources to

appellate courts. *See* Margaret P.P. Mason, Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 YALE L.J. 1191, 1210 (1978). *See generally* Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 431 n.15 (1990).

29. *See* ELLMAN ET AL., *supra* note 15.

30. *See* Crippen, *supra* note 28, at 434-38. Crippen reports that in Oregon in the late 1970s and early 1980s a conflict on the role of the primary-caretaker principle arose in the intermediate appellate courts. After describing this sharp conflict in legal rules, he notes, "[i]nexplicably, the issue did not arise again in an Oregon appellate review after 1983." *Id.* at 438. Obviously hundreds, perhaps thousands, of child custody disputes have arisen in Oregon since 1983. One factor explaining the lack of appellate resolution of the governing legal principles may be that litigants in family disputes, and particularly mothers, lack the resources to pursue appeals. Another probable factor is that the "law" does not regard these issues as important.

31. Peggy Davis, *"There is a Book Out . . .": An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1543-44 (1987).

32. The history is summarized in Thronson v. Thronson, 810 P.2d 428, 431 (Utah Ct. App. 1991).

33. Franklin E. Zimring reports that joint custody was adopted:

> [W]ith no public commitment or private initiative for the systematic assessment of the legal changes on patterns of custody or on child welfare. As fashions change and new interest groups emerge, family law is at risk of becoming a series of experiments that never report results in ways that can help inform the legislative process.

Franklin E. Zimring, *Foreword* to DIVORCE REFORM AT THE CROSSROADS (Stephen D. Sugarman & Herma Kays eds., 1990).

34. JUDITH S. WALLERSTEIN & JOAN B. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980); Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9, 41 (1986).

support two homes for a child. Most divorcing couples are not blessed with these necessary requisites to successful joint custody.[35]

More specifically, the rush to adopt presumptions in favor of psychological parents, and then presumptions in favor of joint custody, failed to consider the adverse impact that these standards predictably have on most mothers. The psychological parent standard demands the services of high-priced experts and hence implicitly favors the party better able to pay for these services.[36] Joint custody adversely impacts on women because it diminishes their bargaining power and forces them to make financial concessions in order to avoid it.[37]

The unreflective rush to adopt these presumptions can best be understood as a failure to attach importance to—and pay attention to—the critical issues that custody law poses. The pattern follows a tradition of devaluing the private, the family, and concerns associated with women.

III. AMY, JAKE, AND THE LAW OF CUSTODY

The law of custody allows us to make some complex observations about the Jake/Amy vision of the law as male or female. In Gilligan's terms, the observation that the law is male critiques the law as excessively rule bound, deductive, individualistic, and insensitive to the particularity of complex human relations. In Jake and Amy terms, traditional family law is, for the most part, female. It rests on very Amy-like concepts such as "the best interests of the child." Amy-like concepts of discretion, altruism, and connection prevail in the law of the family, while the law of the public sphere is seen as more appropriately governed by clear rules, individualism, and deduction.

While the general structure of family law is Amy-like, in application it favors men.[38] Predominately male judges, exercising discretion

35. Joan B. Kelly, *Further Observations on Joint Custody*, 16 U.C. DAVIS L. REV. 762 (1983); Susan Steinman, *Joint Custody: What we Know, What we Have Yet to Learn, and the Judicial and Legislative Implications*, 16 U.C. DAVIS L. REV. 739 (1983).

36. *See* Pikula v. Pikula, 374 N.W.2d 705, 712-13 (Minn. 1985); Garska v. McCoy, 278 S.E.2d 357, 362 (W. Va. 1981).

37. Joanne Schulman & Valerie Pitt, *Second Thoughts on Joint Child Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 GOLDEN GATE U. L. REV. 538, 550-55 (1982); Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 477-81 (1984).

38. As another example, the law of child support traditionally used the Amy-like standard of "fair and equitable financial support for children." Discretionary levels of child support left women and children destitute, while the financial situation of men improved substantially after divorce. LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCE FOR WOMEN AND CHILDREN IN AMERICA (1985). Traditional family

to determine the best interest of the child, are far more empathetic to men in contested disputes. Thus the influence of feminist insight has led many family law scholars to advocate hard-edged Jake-like rules for the resolution of family disputes.[39] Many feminists urge adoption of a primary-caretaker presumption for the resolution of child custody disputes.

A primary-caretaker standard asks who, in *the predivorce* household, performed the following tasks:

(a) planning, preparing meals;

(b) bathing, grooming, dressing children;

(c) purchasing, cleaning clothing;

(d) providing medical care;

(e) transporting to afterschool or social Activities—interacting with teachers, friends;

(f) arranging for alternative childcare (i.e., babysitters);

(g) putting children to bed, waking children in the morning;

(h) tending to children in middle of night;

(i) disciplining children;

(j) educating children in religion and culture; and

(k) teaching skills.[40]

The primary-caretaker standard is more objective. It looks to past conduct ascertainable by nonexpert testimony. Litigation under the primary-caretaker presumption resembles typical civil or commercial litigation. It is a more Jake-like standard. The primary-caretaker presumption articulates a bright-line rule that children should remain in the custody of the parent that does the concrete tasks of taking care of them. In contemporary culture, it is a rule that in most cases favors women, whether or not they work outside the home.[41] Further, it is a

law illustrates that in a deeply patriarchal culture it is dangerous to rely on discretionary rules that allow individual judges to determine what is fair in particular situations.

39. *See infra* note 41. Mandatory Jake-like child support guidelines provide another example of feminist influence to seek male rules to govern family relations. Mandatory support guidelines produce support payments that, in the recent past, could be challenged as confiscatory by the noncustodial parent asserting Amy-like claims of fairness. *See* Irvin Garfinkel & Marygold S. Melli, *The Use of Normative Standards in Family Law Decisions: Developing Mathematical Standards for Child Support*, 24 FAM. L.Q. 157 (1990).

40. Such a standard was applied, for example, in Pikula v. Pikula, 374 N.W.2d 705, 713 (Minn. 1985); and Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981). *See also* Gibson v. Gibson, 304 S.E.2d 336, 338 (W. Va. 1983).

41. MARY A. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 132 (1981); Elizabeth Maret & Barbara Finlay, *The Distribution of Household Labor Among Women in Dual-earner Families*, 46 J. MARRIAGE & FAM. 357, 360 (1984) (showing that even when women work full-time they typically assume primary responsibility for child care); Scott & Derdeyn, *supra* note

rule that reduces the advantage to the party with financial resources because it does not require expert testimony.[42] It limits judicial discretion, provides a larger measure of predictability to guide parties negotiating in the shadow of the law, and provides a basis for appellate oversight.[43] It does not reinforce classic gender stereotypes—men who actually feed the kids, arrange their play dates, and put them to bed qualify as primary caretakers.

While virtually all scholarly commentary supports the primary-caretaker presumption, West Virginia is the *only* jurisdiction to fully adopt it, and Minnesota for a brief period.[44] Other states have not "rejected" it. Rather, the core issue of principles for adjudicating custody—and the far more common problems that confront couples who negotiate in the shadow of the law—simply does not rise to a level that commands the attention of either appellate courts or legislatures.

IV. APPLICATION OF "BEST INTEREST" AND PRIMARY-CARETAKER TO A DIFFICULT HYPOTHETICAL

We agree with most other observers that in bread-and-butter custody disputes the primary-caretaker standard generally provides a

37, at 460-61 (collecting data showing that the movement of women into the wage labor force has not resulted in a corresponding increase in the amount of time men spend performing household tasks or caring for children).

42. For a scholarly discussion of the use of expert testimony in child custody decisionmaking, see Shelia R. Okpaku, *Psychology: Impediment or Aid in Child Custody Cases?*, 29 RUTGERS L. REV. 1117, 1144-50 (1976).

43. *See* Francis J. Catania, Jr., *Accounting to Ourselves for Ourselves: An Analysis of Adjudication in the Resolution of Child Custody Disputes*, 71 NEB. L. REV. 1228, 1260 (1992); Carol S. Bruch, *And How Are the Children? The Effects of Ideology and Medication on Child Custody Law and Children's Well-Being in the United States*, 2 INT'L J.L. & FAM. 106, 108 (1988); Chambers, *supra* note 23, at 480 (supporting primary-caretaker presumption for young children); Crippen, *supra* note 28; Elster, *supra* note 23, at 34; Fineman, *supra* note 23, at 770-74 (arguing that the primary-caretaker presumption should be extended to children of all ages); Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1978 WIS. L. REV. 107, 121; Frank F. Furstenburg Jr., *Divorce and the American Family*, 16 ANN. REV. SOC. 379, 384 (1990); Neely, *supra* note 14, at 180-86 (author of *Garska v. McCoy* explaining West Virginia's standard); Dan O'Hanlon & Margaret Workman, *Beyond the Best Interest of the Child: The Primary Caretaker Doctrine in West Virginia*, 92 W. VA. L. REV. 355, 379 (1990); Marcia O'Kelly, *Blessing the Tie that Binds: Preference for the Primary Caretaker as Custodian*, 63 N.D. L. REV. 481, 483 (1987) (complimenting North Dakota Supreme Court Justice Levine's dissenting opinion advocating primary-caretaker standard); Polikoff, *supra* note 10, at 242; Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 YALE J.L. & FEMINISM 291, 301 (1992); Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 626 (1992); Rena K. Uviller, *Fathers' Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S L.J. 107, 129 (1978) (arguing for a presumption in favor of the person "who has committed herself to care for home and children [yielding] only to a showing that in fact it has been the father who assumed that role during marriage").

44. Crippin, *supra* note 28, at 438.

more objective, fact-oriented, nonexpert standard that appropriately recognizes the importance of caretaking work. In many cases it will be plain that one party—usually the mother—has assumed major responsibility for that work. In the easy cases, the relative clarity of the primary-caretaker presumption will help to alleviate the pressure that now leads women to give up legitimate economic claims to avoid the risks of custody loss generated by the indeterminate and resource intensive "best interest" standard.

However, many cases are not easy. In this section, we consider a difficult case and explore the way that courts might approach it under either the "best interest" or "primary-caretaker" standard:

> HYPOTHETICAL: Alice and Jack were married in 1982 and gave birth to a son, Sean, in 1983, and a daughter, Susan, in 1987. From 1982 until 1988, they lived together in Delaware. Jack worked outside the home as a journeyman carpenter. Alice stayed home and cared for the kids. In 1988, Jack was offered an opportunity to work as a foreman on a large project in Abbott. He moved there, leaving Alice and the children behind. Jack and Alice agreed that it would help his work, and cause the children less disruption, if they did not go with him. From 1988 to 1991, Jack paid less than $1,000 in child support. In 1989 Alice went to work as a waitress. In October 1991, Alice had fallen so far behind in her bills that she could no longer care for the children. Since October 1991, Sean and Susan have lived with their father. During most of this period, Jack has been unemployed. He and the children have been supported by his new companion, while he stays at home and cares for Sean, Susan and the house. In December 1992, Jack filed for divorce, seeking custody of the children. From 1988 to 1991, when the children lived with Alice, they visited with their father for a week's vacation in the summer and for several days over the Christmas holidays. For the past two years, the children have had similar visits with their mother.[45]

Under a "best interest" standard, it is impossible to predict who will win custody because the facts as presented do not provide evidence of the present mental and emotional state of each parent. However, as a practical matter, Alice's financial circumstances make it highly unlikely that she will be able to pay the lawyers and experts needed to establish a "best interest" claim.

Putting aside the resource question, under the "best interest" test either custody result is possible, even within the same state. In a "best interest" jurisdiction, parental fault is relevant. But where is the fault in this case? The father failed to pay support, but the mother "aban-

45. This problem is adapted from Dempsey v. Dempsey, 306 S.E.2d 230 (W. Va. 1983).

doned" the children by sending them to the father. It is likely that the determinative outcome of the "best interest" application will turn on the juxtaposition of the father's failure to pay child support for three years (which caused the impoverishment of the family) as against the mother's action in "giving up the kids" to the father—and the judge's personal reaction to each. But if giving up children is fault, did the father give up the children first?[46]

Many "best interest" jurisdictions give weight to the preference of the child.[47] In this case, what if the eight-year-old's stated preference is to stay with Dad because his recollection of living with Mom is a life of *poverty* as opposed to a middle-class lifestyle he now enjoys with Dad? How does a judge weigh those factors? What if the daughter's preference is different? Is it irrelevant because she is too young? "Best interest" standards often include both a preference to keep siblings together and a preference to place an older child with a parent of the same gender. These preferences are often flatly contradictory.

It is not easy to apply the primary-caretaker presumption in this hypothetical case. First, it is not clear that there is *one* primary caretaker.[48] To what period of time does the court look in applying the objective factors? The prior year of the child's life? Or the prior eight years? Does the child's age matter in that regard? How, if at all, does a judge consider failure to support as an element of parental fault? What about failure to visit? Do either rise to a level of unfitness? If not, are they at all relevant? Does it matter that the original primary-caretaker arrangement would have continued but for the intervention of the father's failure to support?

In the West Virginia case which forms the basis for this hypothetical, the court found no primary caretaker and, applying a "best interest" standard, awarded custody to the father on the grounds that the children had adjusted well to life with him. Judge Miller, dissenting, protested:

> [W]e pervert the principle of [*Garska*] if we permit a primary caretaker to lose her favored role simply because her husband abandons her and his child without any meaningful support, thereby forcing her to give up custody of the child . . . . Presumably, if Mrs. Demp-

46. Some jurisdictions, including New York have doctrines that presume when a parent leaves the household without the children, the departing parent *consents* to other parent's custody of the child(ren). Robert C.R. v. Victoria R., 532 N.Y.S.2d 176, 177 (App. Div. 1988); Meirowitz v. Meirowitz, 466 N.Y.S.2d 434, 435 (App. Div. 1983).

47. *See* ELLMAN ET AL., *supra* note 15, at 532-34.

48. The West Virginia court found that there was no primary caretaker on these facts. *Dempsey*, 306 S.E.2d at 231.

> sey had delivered temporary custody . . . to the . . . Department of Welfare, she could have avoided the problem. Because she chose a more humane approach, she has now lost her child, a singularly inequitable result.[49]

CONCLUSION

The primary-caretaker presumption is not a panacea. Our problem illustrates that there are cases where it is not simple to apply a clear rule. Further, experience in both West Virginia and Minnesota suggests that the intended clarity of the rule often is undermined by an expansive concept of parental unfitness under which a mother's unconventional behavior is judged much more harshly than similar behavior on the part of a man.[50] The rule will not operate in a predictable Jake-like fashion unless appellate courts are willing to insist that lower courts make reviewable findings of fact.[51]

Nonetheless, we believe that the primary-caretaker presumption is an improvement over a "best interest" or psychological parent standard. In Gilligan's terms, the primary-caretaker presumption is a Jake-like rule. Overall, the problems we confront in family law support the notion implicit in Gilligan's study: decisionmaking is inadequate if it is solely discretionary and primarily involves a judge's personal beliefs about human relationships *or* solely based on clear rules and inflexible principles. The goal must be to incorporate the best of each.

49. *Id.* at 232.
50. Crippen, *supra* note 28, at 463; Sack, *supra* note 43, at 303.
51. Crippen, *supra* note 28, at 437-38.